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No. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMFAC FOODS, INC.,

Petitioner,

v.

ORE-IDA FOODS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether a federal court of appeals is bound by the "clearly erroneous standard" of Fed. R. Civ. P. 52(a) in reviewing a district court's finding on the issue of patent infringement.

2. Whether a court of appeals can arrogate the fact-finding function on the issue of patent infringement when it concludes that the underlying facts are not in dispute, though they were produced at an extended trial.

PARTIES INVOLVED

The parties involved in this petition are Amfac Foods, Inc., petitioner, and Ore-Ida Foods, Inc., respondent. The parents, subsidiaries, and affiliates of petitioner are set forth in Appendix F, *infra*, pp. 27a-28a.

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Petition For a Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

The petitioner, Amfac Foods, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 2, 1982.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals is not reported; it is set forth in Appendix A, *infra*, pp. 1a-5a. The opinion of the United States District Court for the District of Idaho is reported at 210 U.S.P.Q. (BNA) 553 (D. Idaho 1980). It appears in Appendix B, *infra*, pp. 7a-20a.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit, which was entered on April 2, 1982, is set forth in Appendix D, *infra*, p. 23a. A timely petition for rehearing and

suggestion for rehearing en banc was denied by an order entered on June 17, 1982. The order appears in Appendix E, *infra*, p. 25a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND RULE INVOLVED

35 U.S.C. § 271(a):

> Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

STATEMENT

Petitioner, Amfac Foods, Inc., is a Delaware corporation with its principal place of business in Portland, Oregon.

Through Lamb-Weston, Inc., a wholly-owned subsidiary, petitioner is engaged in the processing of potatoes.[1] Petitioner was the successor-in-interest to two patents—Nos. 3,109,468 and 3,116,772.[2] The patents involve methods of, and an apparatus for, processing potatoes into French fry strips which are then treated, frozen, and sold to both institutional and retail markets.

Respondent, Ore-Ida Foods, Inc., is a Delaware corporation with its principal place of business in Boise, Idaho. Respondent is also engaged in the business of processing potatoes. In 1976, respondent began using a potato processing machine, which it called the "Box Cutter," in its commercial operations.

In 1978, petitioner, alleging that respondent's Box Cutter infringed the two patents referred to above, brought an action for patent infringement in the United States District Court for the District of Idaho. The jurisdiction of the district court was invoked under 28 U.S.C. § 1338(a).

After a ten-day trial to the court, the district judge granted petitioner's request for injunctive relief and ordered an accounting.[3] The district judge, after considering extensive oral and documentary evidence, including the testimony of experts on both sides, held that both patents were valid[4] and that respondent's Box Cutter had infringed several claims in these patents. More specifically, the judge found that the Box Cutter was equivalent to the mechanism described in claims 1, 2, and 4 of petitioner's method patent and that it employed elements which were equivalent to claims 8 and 24 of petitioner's apparatus patent.

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[1] At the time of trial, Lamb-Weston was a division of petitioner.

[2] Patent No. 3,109,468 (the "apparatus" patent) was issued on November 5, 1963. Patent No. 3,116,772 (the "method" patent) was issued on January 7, 1964. Both patents have now expired.

[3] The injunction was stayed by the court of appeals pending appeal after the district court had denied a stay.

[4] The district court noted that, because the same patents had been found valid (by another judge) in *Amfac Foods, Inc. v. J. R. Simplot Co.*, 203 U.S.P.Q. (BNA) 978 (D. Idaho 1978), a presumption of their validity attached. In the *Simplot* case, the district court found that these two patents were infringed by Simplot's machine, which had many of the same features as respondent's Box Cutter.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit, which reversed the judgment, vacated the injunction, and remanded the case to the district court with instructions to dismiss the complaint with prejudice. The court, which addressed only the issue of infringement, set forth the standard of review it employed:

> Although infringement is generally a question of fact, where, as here, the facts are not in dispute, both the question of infringement and the question of the scope of the patent claims are freely reviewable questions of law. *Hanson v. Colliver,* 282 F.2d 66, 69 (9th Cir. 1960); *Del Francia v. Stanthony Corp.,* 278 F.2d 745, 747, 748 n.5 (9th Cir. 1960).

Appendix A, *infra,* pp. 1a-2a. After independently evaluating the evidence presented, the court of appeals made its own finding that there was neither literal infringement nor equivalency, and concluded: "The Ore-Ida Box Cutter does not, as a matter of law, infringe any of the claims at issue in the Amfac 'method' or 'apparatus' patents." Appendix A, *infra,* p. 5a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With Decisions Of This Court As To The Applicability Of Fed. R. Civ. P. 52(a) In Patent Infringement Cases.

This Court has long held that the determination of whether an accused machine infringes a patented device, i.e., whether there is substantial identity between the two,[5] is a question of

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[5] A violation of 35 U.S.C. § 271(a) can be established by proving either literal infringement or that the accused device is the "equivalent" of the patented invention. "If [the] accused matter falls clearly within the [words of the] claim, infringement is made out and that is the end of it .... [In addition, an accused machine is the equivalent of a patented device] 'if it performs substantially the same function in substantially the same way to obtain the same result.' *Sanitary Refrigerator Co. v. Winters,* 280 U.S. 30, 42." *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 339 U.S. 605, 607-8.

fact. *Wilson v. Barnum*, 8 Howard 258. Indeed, in *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 339 U.S. 605, this Court, in unequivocal language, stated:

> *A finding of equivalence is a determination of fact.* Proof can be made in any form: through testimony of experts or others versed in the technology; by documents, including texts and treaties; and, of course, by the disclosures of the prior art. Like any other issue of fact, final determination requires a balancing of credibility, persuasiveness and weight of evidence. *It is to be decided by the trial court and that court's decision, under general principles of appellate review, should not be disturbed unless clearly erroneous.* Particularly is this so in a field where so much depends upon familiarity with specific scientific problems and principles not usually contained in the general storehouse of knowledge and experience.
>
> * * *
>
> *It is not for this Court to even essay an independent evaluation of this evidence. This is the function of the trial court.*

Id. at 609-11 (emphasis added).

In the instant case, the Ninth Circuit, in reviewing the district court's finding of equivalency, did not follow the standard of review set forth in Rule 52(a). The court concluded that the underlying facts were not in dispute,[6] and on this basis held that the issue of infringement was a freely reviewable question of law. The Ninth Circuit made its own

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[6] The court of appeals' conclusion that the facts were not in dispute is not supported by the record. The district judge, in the course of a ten-day trial, was presented with extensive oral and documentary evidence. The judge heard testimony, including the presentations of experts on both sides, which was in sharp disagreement. In resolving the conflicts, the judge, ultimately, drew an inference on the issue of equivalency which had adequate support in the record. Under these circumstances, the court of appeals' arrogation of the fact-finding role, in the teeth of Fed. R. Civ. P. 52(a) and this Court's decision in the *Graver Tank & Mfg. Co.* case, is insupportable.

independent evaluation of the evidence presented, and concluded that respondent's Box Cutter did not infringe the patents in question.

The court of appeals' decision is in direct conflict with applicable decisions of this Court. Despite the clear teaching of *Graver Tank*, the Ninth Circuit reversed factual findings on the issue of infringement without having found them to be clearly erroneous and without having found them to be unreasonable as a matter of law. Although the clearly erroneous rule does not apply to findings made under a mistaken view of the controlling legal principles, the court of appeals did not suggest that the district judge used an incorrect legal standard.[7] Furthermore, the court of appeals did not suggest that the district judge's findings were not reasonably supported by the evidence. And, when conflicting inferences can reasonably be drawn, the initial determination of factual questions must be left to the tribunal charged with that responsibility. Since there was no suggestion that the district judge used the wrong legal standard and no suggestion that the district judge's findings on the issue of infringement were unreasonable as a matter of law,[8] the findings came to the court of appeals "well armed with the buckler and shield"[9] of Rule 52(a).

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[7] If findings of fact on the issue of infringement had been set aside for an error of law, the court of appeals would have been required to remand "for further proceedings to the tribunal charged with the task of fact-finding in the first instance." *Pullman-Standard v. Swint*, 102 S.Ct. 1781, 1792. In *Pullman-Standard*, this Court emphasized that fact-finding is the basic responsibility of trial courts, and that, "where findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Id.*

[8] As with all factual findings, there may be instances in which the determination of equivalency can be made as a matter of law. For example, in *Singer Manufacturing Co. v. Cramer*, 192 U.S. 265, this Court found that the question of infringement was one of law. This was so, because the inference to be drawn from the undisputed facts was so clear that the defendant was entitled to a directed verdict. However, when conflicting inferences can reasonably be drawn, the initial determination must be left to the finder of fact.

[9] *Horton v. United States Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961).

The court of appeals' failure to accord the district judge's findings the deference required by Fed R. Civ. P. 52(a) was premised upon a fundamental misreading of the law. The court concluded that the ultimate question of infringement resolves into a question of law when the underlying facts are not in dispute. This view,[10] which appears to be based on the notion that factual inferences from documentary evidence or undisputed facts are not subject to the clearly erroneous standard of Rule 52(a), is inconsistent with decisions of this Court.

Despite a great deal of confusion in the lower courts,[11] it is manifest that Fed. R. Civ. P. 52(a) applies "to *all classes of findings* in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, *or of a fact deduced or inferred from uncontradicted testimony.*" Fed. R. Civ. P. 52 advisory committee note (emphasis added). Although the trial judge's opportunity to make credibility determinations may require an appellate court to give special deference to factual findings, Rule 52(a) is not inapplicable when credibility evaluations play a less prominent role in a lawsuit. As this Court has stated: "In so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, . . . , Rule 52(a) of the Rules of Civil Procedure is applicable." *United States v. United States Gypsum Co.*, 333 U.S. 364, 394; *see United States v. Singer Mfg. Co.*, 374 U.S. 174, 194 n.8.

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[10] That the decision below represents the law in the Ninth Circuit was made clear in *CS&M, Inc. v. Covington Brothers Technologies*, 678 F.2d 118 (9th Cir. 1982). In *CS&M*, decided shortly after the decision below, the Ninth Circuit, citing the same two cases upon which the panel below relied, reiterated its position that infringement is a question of law when the underlying facts are not in dispute.

[11] There is much uncertainty in the lower courts as to whether Rule 52(a) applies to findings based solely upon documentary evidence. In *Custom Paper Products Co. v. Atlantic Paper Box Co.*, 469 F.2d 178, 179 (1st Cir. 1972), a case involving issues of patent validity and infringement, the court addressed the issue:

> Before proceeding to the merits we dispose of a procedural issue raised by Hincher. Because the evidence was all documentary and by depositions and affidavits, he urges us to review the evidence de novo and make our own findings. Some courts have

(*footnote continues*)

Thus, the Ninth Circuit's justification for disregarding Fed. R. Civ. P. 52(a) cannot withstand scrutiny. In addition, the other rationale used to justify circumvention of Rule 52(a), i.e., the characterization of patent infringement as an *ultimate* fact,[12] is also inconsistent with the decisions of this Court. In *Industrial Instrument Corp. v. Foxboro Co.*, 307 F.2d 783 (5th Cir. 1962), *modified*, 310 F.2d 686 (5th Cir. 1963), the Fifth Circuit, in reversing a finding on the issue of equivalency, explained the ultimate fact theory: "*We may reverse free of the clearly erroneous rule where, as is the case here, the issue revolves around an ultimate fact question* as distinguished from subsidiary fact questions, or where mixed questions of law and fact are presented when there is error as to the law. Galena Oaks Corporation v. Scofield, 1954, 5 Cir., 218 F.2d 217." *Id.* at 786 n.2 (emphasis added). This rationale is in direct conflict with the express language of Fed. R. Civ. P. 52 and the

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(*footnote continued*)

> taken this approach. *See* Nasco Inc. v. Vision-Wrap, Inc., 7 Cir., 1965, 352 F.2d 905, 908; Orvis v. Higgins, 2 Cir., 1950, 180 F.2d 537, 539, cert. denied 340 U.S. 810 .... Others, while shrinking from a de novo hearing on appeal, have suggested that in this situation something less than the "clearly erroneous" standard of review, F. R. Civ. P. 52(a), is appropriate. *See, e.g.*, Caradelis v. Refineria Panama, 5 Cir., 1967, 384 F.2d 589, 593-594. We have not taken either view. *See* Texas Co. v. R. O'Brien & Co., 1 Cir., 1957, 242 F.2d 526, 529; Leach v. Crucible Center Co., 1 Cir., 1968, 388 F.2d 176, 179, and do not propose to.

As one commentator has stated:

> The main unsettled question in the construction of Rule 52 is whether the deference that must normally be paid to the findings by the trial court applies when the finding rests on an inference drawn from undisputed facts or documentary evidence. Despite the clear language of the rule, two Notes by the Advisory Committee, and pointed expressions from the Supreme Court, the authorities are indescribably confused. Even within a single circuit, decisions vacillate inexplicably from one test to another.

9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2587 at 740 (1971) (footnote omitted).

[12] The Fifth Circuit, which has also stated that infringement is a question of law when the basic facts are not in dispute, *Up-Right, Inc. v. Safway Products, Inc.*, 315 F.2d 23 (5th Cir. 1963), has likewise characterized patent infringement as an "ultimate" fact. *East v. Romine, Inc.*, 518 F.2d 332, 339 (5th Cir. 1975).

decisions of this Court which establish that a factual finding, even on an *ultimate* fact such as infringement or equivalency, does not become a freely reviewable conclusion of law when the court of appeals asserts that the underlying facts upon which the finding is based are not in dispute.[13]

This Court has recently declared the demise of the theory that Fed. R. Civ. P. 52(a) does not apply to "ultimate" facts. In rejecting the Fifth Circuit's rule with respect to "ultimate" facts in a Title VII context, this Court stated: "[Rule 52] does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1789.[14] Therefore, reliance on the ultimate fact theory to avoid the requirements of Rule 52 in the patent infringement context is no longer justified.

In sum, the decision below is in conflict with both Rule 52(a) and the decisions of this Court as to the applicability of the clearly erroneous standard in patent cases. Moreover, the decision adds to an area of uncertainty and confusion in the law in the lower courts. This Court should grant this petition in order to clarify Rule 52(a)'s applicability to a finding of patent infringement.

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[13] The characterization of a finding as legal or factual, which determines the applicability of Rule 52(a), can be difficult. The problem is made more complex because certain issues are characterized as mixed questions of law and fact. And, as this Court has recently noted, there is substantial authority in the circuits on both sides of the issue of the applicability of Rule 52(a) to mixed questions of law and fact. *Pullman-Standard v. Swint*, 102 S. Ct. 1781, 1790 n.19. The short answer to the characterization issue here is that this Court has already resolved the question. This Court has stated that, because "[a] finding of equivalence is a determination of fact," *Graver Tank & Mfg. Co., supra*, at 609, the clearly erroneous standard applies to a district court's finding on the issue.

[14] The Fifth Circuit's rule rejected in *Pullman-Standard* was based on the same case—*Galena Oaks Corp. v. Scofield*, 218 F.2d 217 (5th Cir. 1954)—relied upon in *Industrial Instrument* to justify freely reviewing a district court's finding on the issue of equivalency.

II. The Decision Below Raises An Important And Recurring Problem Concerning The Scope Of Appellate Review In Patent Infringement Cases.

The Ninth Circuit's circumvention of Fed. R. Civ. P. 52(a) raises an important problem concerning the scope of appellate review in patent infringement cases. This Court, in emphasizing that general principles of appellate review apply to findings of equivalency, has made it clear that the clearly erroneous rule has a particularly vital role to play in the patent context. *Graver Tank & Mfg. Co., supra,* at 610. The fact-specific nature of the litigation, particularly when it involves the doctrine of equivalents, suggests that there is an especial need for deference to the fact-finder. Thus, the court of appeals' rejection of the clearly erroneous standard is of especial concern.

The decision below also raises a problem which has continued to perplex the lower courts. As the Ninth Circuit's decision illustrates, the proper application of Rule 52(a) has been a source of confusion in patent suits. It has been especially difficult to determine whether a particular issue is one of fact or law.[15] In addition, this problem recurs continually

[15] "But where 'fact' ends and 'law' takes over is particularly troublesome in patent litigation." 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 52.05[2] at 2697-9 (2d ed. 1982) (footnote omitted). Although it is particularly vexing in the patent area, the difficulty of determining whether an issue is factual or legal is a constant source of confusion. For example, in the trademark area, there is a conflict among the circuits as to whether a finding on the "likelihood of confusion" issue is a question of fact or law, or a mixed question of fact and law. 1 Gilson, *Trademark Protection and Practice* § 8.14 (1982) (noting split in the circuits on this issue). The corollary issue—whether a court of appeals is bound by the clearly erroneous standard of Fed. R. Civ. P. 52(a) in reviewing a finding of likelihood of confusion—is raised in a case presently pending before this Court. *Elby's Big Boy of Steubenville, Inc. v. Frisch's Restaurants, Inc.*, No. 81-2012 (petition for certiorari filed April 29, 1982). In *Frisch's Restaurants, Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642 (6th Cir. 1982), the Sixth Circuit relied on a Ninth Circuit case, *Alpha Industries, Inc. v. Alpha Steel Tube & Shapes, Inc.*, 616 F.2d 440 (9th Cir. 1980), in concluding that the ultimate determination of likelihood of confusion is a legal conclusion freely reviewable by an appellate court.

because the fact/law issue and its corollary—which standard of review should be employed—arise in virtually every patent case.

As a result of this confusion, the courts of appeals have exercised an ever-widening scope of review in patent litigation.[16] And, this overly expansive exercise of appellate review produces a number of adverse consequences.

This Court has recently emphasized that adherence to Fed. R. Civ. P. 52(a) is essential to an appropriate allocation of responsibilities between the district courts and the courts of appeals.[17] Continued circumvention of Rule 52(a) in the patent context threatens to disrupt both the appropriate balance between the trial and appellate courts and the orderly administration of patent adjudication.

The adverse consequences which can flow from an overly expansive exercise of appellate review have long been recognized. As Judge Sanborn, one of the great judges of the Eighth Circuit, stated:

> The entire responsibility for deciding doubtful fact questions in a nonjury case should be, and we think it

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[16] Even after *Graver Tank & Mfg. Co.*, other courts of appeals, in addition to the Ninth Circuit, have circumvented Rule 52(a) in reviewing findings on the issue of infringement. *See, e.g., Foster Cathead Co. v. Hasha*, 382 F.2d 761, 766 (5th Cir. 1967), *cert. denied*, 390 U.S. 906 ("We conclude, from a detailed review of the testimony and the exhibits in the case, that there has been no infringement. The structures involved in the patent in suit and Foster's Model 77 spinner are relatively simple mechanical devices, and their manner of operation is undisputed. While infringement is usually a question of fact, that rule is subject to the exception that where, as here, the findings of infringement *vel non*, are based on inferences drawn from exhibits, documents, and uncontradicted testimony, rather than on the conflicting testimony of witnesses whose credibility is for the jury, such findings are subject to full review as questions of law. Samuelson v. Bethlehem Steel Company, supra; Cameron Iron Works v. Stekoll, 5 Cir. 1957, 242 F.2d 17, 21.") (footnote omitted).

[17] *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182 (court of appeals erred in setting aside findings of fact that were not clearly erroneous in a trademark case); *Pullman-Standard v. Swint, supra* (court of appeals erred in not applying Rule 52(a) to district court's finding that any differences resulting from a seniority system were not the result of an intent to discriminate).

> is, that of the district court. The existence of any doubt as to whether the trial court or this Court is the ultimate trier of fact issues in nonjury cases is, we think, detrimental to the orderly administration of justice, impairs the confidence of litigants and the public in the decisions of the district courts, and multiplies the number of appeals in such cases.

Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950).[18] Because, due to the nature of patent litigation, adherence to Rule 52 is so important, these prospects are of especial concern.

A reaffirmation of Fed. R. Civ. P. 52(a)'s applicability to the issue of infringement, even when the underlying facts are allegedly not in dispute, is clearly needed. Adherence to Rule 52(a) maintains the requisite balance between the courts in the federal system, and leaves the fact-finding function with the tribunal charged with that basic responsibility. Without a precise delineation of the proper scope of appellate review in patent cases, the administration of patent litigation will be disrupted and the essential roles of the trial and appellate courts will be confused. This petition should be granted so that the Court may provide a clear statement of controlling principles for the guidance of the lower courts.[19]

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[18] Judge Nangle, of the Eastern District of Missouri, in a recent article, sounded "a genuine expression of alarm over the great imbalance that has developed between trial courts and appellate courts." Nangle, *The Ever Widening Scope of Fact Review in Federal Appellate Courts—Is the "Clearly Erroneous Rule" Being Avoided?*, 59 Wash. U.L.Q. 409, 410-11 (1981). In addition to the concerns expressed by Judge Sanborn, Judge Nangle identified other undesirable consequences from circumvention of Rule 52(a). These included: "[a] lowering in the morale of district court judges," "the decreasing likelihood of settlements," and a decline in "respect for our legal system." *Id.* at 427.

[19] This Court has recognized the necessity for precise statements of the legal principles governing the resolution of patent disputes. *See, e.g., Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (test of validity of combination patents); *Funk Brothers Seed Co. v. Kalo Inoculant Co.*, 333 U.S. 127 (meaning of invention). The issue in this case—whether a court of appeals is bound by Rule 52(a) in reviewing a district court's finding of infringement on the basis that the underlying facts are not in dispute—is of equally broad significance.

CONCLUSION

This case presents, clearly and directly, the issue whether a federal court of appeals is bound by the clearly erroneous standard in reviewing a finding of fact, i.e., a finding of patent infringement, based upon evidence which the court determines is undisputed. This case does not present the intensely fact-specific question of whether the clearly erroneous standard was properly applied, since the court below left no doubt that it did not consider itself constrained by Rule 52(a). The court of appeals, which first decided that the underlying facts from which the determination of infringement or non-infringement would be made were not in dispute—despite a ten-day trial—clearly made its own independent evaluation of the facts. Therefore, the issue involved—whether a federal court of appeals is bound by Rule 52(a) in reviewing a finding of patent infringement—is squarely presented for this Court's consideration.

The decision below is in conflict with decisions of this Court as to the applicability of Fed. R. Civ. P. 52(a) in patent infringement cases. In addition, it raises an important and recurring problem concerning the scope of appellate review in patent infringement litigation which should be resolved by this Court.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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